G VISVANATHAN GOVINDASAMY & ORS

v.

PHILEOALLIED BANK (MALAYSIA) BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
PAJAN SINGH GILL JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: P-02-316-2001]
2 JUNE 2004

CIVIL PROCEDURE: *Summons for directions - Delay in taking out summons for directions - Order for sale of charged land obtained but summons for directions to fix auction date of land filed more than 12 years later - Whether summons for directions filed out of time - Whether barred under s. 21 Limitation Act 1953 - Whether summons for directions constituted a fresh action - Whether barred by delay and laches - Limitation Act 1953, ss. 21, 32*

LIMITATION: *Accrual of cause of action - Summons for directions - Delay in taking out summons for directions - Order for sale of charged land obtained but summons for directions to fix auction date of land filed more than 12 years later - Whether summons for directions filed out of time - Whether barred under s. 21 Limitation Act 1953 - Whether summons for directions constituted a fresh action - Whether barred by delay and laches - Limitation Act 1953, ss. 21, 32*

The appellants were the registered proprietors of certain land ('the said land'); the Central Co-Operative Bank Ltd ('CCB') granted a loan to a borrower on the security of the said land by way of a third party charge. Upon default of repayment by the borrower and failure by the appellants to remedy the breach, CCB filed an originating summons in the High Court on 12 April 1984 for sale of the said land. On 24 January 1987, it obtained an order for sale, and the appellants' appeal against that order was dismissed on 14 September 1987. Subsequently, Bank Negara appointed a receiver *ie*, Allied Bank (Malaysia) Bhd to take over the assets and liabilities of CCB. During negotiations between the parties to settle, the respondent's solicitors passed away, resulting in the appointment of new solicitors, who also had to reconstruct the file in respect of the present appeal as the original file was missing. Later, Allied Bank (Malaysia) Bhd changed its name to Phileo Allied Bank (Malaysia) Bhd and

as a result of that, the respondent had to apply to the court to have the name of CCB changed to Phileo Allied Bank as the successor-in-title of CCB. On 22 December 1999, the respondent filed its summons for directions, *inter alia*, to fix an auction date of the said land and the reserve price. The appellants raised their objections on the summons for directions on the following grounds: (i) the summons for directions was filed out of time and was therefore barred under s. 21 of the Limitation Act 1953 ('the Act'); or (ii) in the alternative, the summons for directions was barred by delay and laches which prejudiced the appellants.

Held (dismissing the appeal):
Per Mokhtar Sidin JCA

[1] The summons for directions was a mere continuation of the main proceeding which was the originating summons filed in the High Court on 12 April 1984 by the respondent. The High Court allowed the application and the Federal Court dismissed the subsequent appeal on 14 September 1987. The application by the respondent was consequential of the original order for sale given by the High Court which was to give effect to the order for sale. Thus, the summons for directions did not constitute a new or fresh action. The main action in the present appeal was the application for an order for sale which was still alive and pending. Following the decision in *Perwira Affin Bank Bhd v. Lim Weow*, the Act applies to a fresh foreclosure proceeding and not a continuation of that proceeding. (pp 216 g-h, 218 e & 219 a)

[2] On the facts, although there was a delay in pursuing the summons for directions, there were good reasons for the delay in view of the former plaintiff, CCB, being placed under receivership and the negotiations that were going on between the parties. The file in the court's registry also went missing. Hence, there was no merit in the appellants' contention that the respondent was guilty of delay and laches in accordance with s. 32 of the Act. The summons for directions (the present appeal) was only to give effect to the order for sale already affirmed by the Federal Court. Furthermore, the facts showed that there was no prejudice at all to the appellants. (pp 220 f-h & 221 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah pemilik berdaftar sebidang tanah ('tanah tersebut'); pihak Central Co-Operative Bank Ltd ('CCB') telah memberi pinjaman kepada seorang peminjam berdasarkan jaminan tanah tersebut melalui suatu gadaian pihak ketiga. Ekoran keingkaran peminjam untuk membayar balik serta kegagalan perayu untuk meremedi keingkaran, CCB telah memfail saman pemula di

Mahkamah Tinggi pada 12 April 1984 bagi menjual tanah tersebut. Pada 24 Januari 1987, CCB memperoleh perintah jualan, dan rayuan perayu terhadapnya telah ditolak pada 14 September 1987. Berikutnya Bank Negara telah melantik penerima, iaitu Allied Bank (Malaysia) Bhd untuk mengambilalih aset dan tanggungan CCB. Sewaktu rundingan penyelesaian sedang berjalan di antara pihak-pihak, peguam responden telah meninggal dunia, dan peguam baru yang dilantik terpaksa menyusun semula fail rayuan semasa disebabkan fail yang lama telah hilang. Allied Bank (Malaysia) Bhd kemudian menukar namanya kepada Phileo Allied Bank (Malaysia) Bhd, dan berikutnya responden memohon kepada mahkamah untuk menukar nama CCB kepada Phileo Allied Bank (Malaysia) Bhd selaku pewaris-dalam-milik CCB. Pada 22 Disember 1999, responden memfail saman untuk arahannya, antara lain, untuk menetapkan tarikh pelelongan tanah tersebut serta harga simpanannya. Perayu telah membangkitkan bantahan terhadap saman untuk arahan atas alasan-alasan berikut: (i) saman untuk arahan tersebut telah difail diluar masa dan dengan itu dihalang oleh s. 21 Akta Had Masa 1953 ('Akta'); atau (ii) secara alternatifnya bahawa saman untuk arahan menjadi terhalang oleh kelengahan yang memudaratkan perayu.

Diputuskan (menolak rayuan):
Oleh Mokhtar Sidin HMR

[1] Saman untuk arahan hanyalah satu kesinambungan kepada prosiding utama iaitu saman pemula yang difailkan di Mahkamah Tinggi pada 12 April 1984 oleh responden. Mahkamah Tinggi membenarkan permohonan dan rayuan berikutnya telah ditolak oleh Mahkamah Persekutuan pada 14 September 1987. Permohonan responden adalah akibat yang menyusul dari perintah jualan asal yang diberi oleh Mahkamah Tinggi yang bertujuan memberi kesan kepada perintah jualan. Maka itu, saman untuk arahan bukanlah suatu tindakan baru. Tindakan utama dalam kes ini adalah permohonan untuk perintah jualan yang masih hidup dan menunggu pemutusan. Berdasarkan keputusan dalam *Perwira Affin Bank Berhad lwn. Lim Weow*, Akta terpakai kepada suatu prosiding halangtebus yang baru tetapi tidak kepada suatu kesinambungan prosiding sedemikian.

[2] Berdasarkan fakta, walaupun berlaku kelengahan dalam mengendali saman untuk arahan, terdapat sebab-sebab yang kuat untuk kelengahan tersebut, memandangkan bahawa plaintif terdahulu, iaitu CCB telah diletak di bawah penerimaan dan terdapat juga rundingan berterusan di antara pihak-pihak. Fail tersebut dalam registri mahkamah pun telah hilang. Dengan demikian, penegasan perayu bahawa responden telah melengah dan melewat-lewatkan kesnya seperti yang dikatakan oleh s. 32 Akta adalah tidak bermerit. Saman untuk arahan (rayuan semasa) hanyalah untuk memberi kesan kepada

perintah jualan yang telah pun diperakui oleh Mahkamah Persekutuan. Lagipun, fakta menunjukkan bahawa perayu langsung tidak mengalami sebarang prejudis.

Case(s) referred to:
Daud v. Ibrahim [1961] 27 MLJ 43 ***(dist)***
Forbes v. Lowsley & Anor [1999] AC 329 ***(foll)***
McHenry McDermott v. Boyd [1894] 3 Ch D 290 ***(refd)***
Nadifinco Ltd v. Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 ***(refd)***
Perwira Affin Bank Bhd v. Lim Weow [1998] 4 CLJ 17 CA ***(foll)***
Sutton v. Sutton [1882] 22 Ch D 511 ***(refd)***
The United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***

Legislation referred to:
Conveyancing and Law of Property Ordinance 1886, ss. 25, 26
Courts of Judicature Act 1964, s. 3
Limitation Act 1953, ss. 2, 21(1), 32
National Land Code, ss. 253, 256, 270

Limitation Act 1980 [UK], s. 24(1), (2)

For the appellants - Mahinder Singh Dulku; M/s Mohd Hussain Ibrahim & Co
For the respondent - V Arivanandhan; M/s Cheong Wai Meng & Van Buerle

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-209-1964]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:
Briefly, the facts of the case are; the appellants are the registered proprietors of the land known as Lot 729, Town Section 11W, North East District, Penang. In 1983, The Central Co-Operative Bank Ltd (CCB) granted a loan to one Mutuerulan s/o Irulandi (after this to be referred to as "the borrower") on the security of the said land by way of a third party charge. The third party charge was executed by the appellants/defendants in favour of CCB under presentation No. 11365/83 Jilid: 278, Folio: 87. The borrower defaulted in the repayment of the loan resulting with CCB issuing a notice of default in Form 16D dated 8 December 1983 to the appellants to remedy the breach within one month which the appellants failed to do. On 12 April 1984, CCB filed an originating summons in the High Court for the sale of the said land. On 24 January 1987, the respondent obtained the order of sale under s. 256 of the National Land Code 1965. The appellants appealed against that order and on 14 September

1987 the appellants' appeal was dismissed. Apparently, after the appeal was dismissed, Bank Negara obtained a court's order for the appointment of a receiver to take care of the affairs and the assets of CCB. On 5 December 1994, Allied Bank (Malaysia) Berhad took over the assets and liabilities of CCB. Sometime in 1995/1996, there were negotiations between the parties to settle. While this was going on the respondent's solicitors passed away. The respondent then appointed Messrs Cheong Wai Meng & Van Buerle as their solicitors. At the same time, the original file in respect of the present appeal was found missing and the new solicitors appointed by the respondent had to reconstruct the file. Later, Allied Bank (Malaysia) Bhd changed its name to Phileo Allied Bank (Malaysia) Berhad and as a result of that the respondent had to apply to the court to have the name of CCB changed to Phileo Allied Bank as the successor-in-title of CCB. On 22 December 1999 the respondent filed its summons for directions, *inter alia*, to fix an auction date of the said land and the reserve price. The matter came up for hearing on 16 November 2000 before the deputy registrar.

The appellants raised their objection on the summons for directions on the following grounds:

(a) the summons for directions was filed after more than 12 years from the date of the order for sale dated 24 January 1987 and therefore the said application is barred under s. 21 of the Limitation Act 1953; and

(b) in the alternative, the summons for directions is barred by delay and laches.

The deputy registrar dismissed the appellants' objection and granted the order as prayed for by the respondent in their summons for directions. Being dissatisfied with that decision the appellants appealed to the judge in chambers who dismissed the appeal on 23 March 2001. Being dissatisfied with that decision the appellants now appeal to this court.

The learned counsel for the appellants submitted that the summons for directions was filed out of time and therefore is barred under s. 21 of the Limitation Act. According to the appellants' counsel the word 'action' which appears in s. 21 must necessarily include an application for summons for directions to fix an auction date having regard to the definition of 'action' in the Limitation Act 1953 and the definition of 'proceeding' in s. 3 of the Courts of Judicature Act 1964. The relevant provisions of s. 21 of the Limitation Act are as follows:

21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land.

(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

(2) ...

(3) ...

(4) ...

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due:

Provided that

(a) where a prior mortgagee or other incumbrancer has been in possession of the property mortgaged or charged, and an action is brought within one year of the discontinuance of such possession by the subsequent incumbrancer, he may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) ...

The appellants' counsel submitted that the word 'action' appearing in line 1 of s. 21(1) of the Limitation Act 1953 is defined under s. 2 of the same Act which provides:

'action' includes a suit or any other proceeding in a court of law.

The appellants' counsel also submitted that the word 'proceeding' is defined in s. 3 of the Courts of Judicature Act 1964 which provides:

> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding;

According to the learned counsel, having regards to the definitions in s. 2 of the Limitation Act and s. 3 of the Courts of Judicature Act, it is clear that the respondent's summons for directions is 'an application' filed at a 'stage of proceeding' to enforce, *inter alia*, the charge or mortgage or to receive the proceeds of sale or to recover any principal sum secured by a mortgage or other charge. Such an application is therefore caught and consequently barred by the 12-year limitation period stipulated in s. 21(1) of the Limitation Act. To strengthen his argument the learned counsel cited the decision of *Daud v. Ibrahim* [1961] 27 MLJ 43. In that case the respondent who was the plaintiff in the Magistrates Court in Alor Star filed a civil suit in 1938 against two defendants, one of whom was the appellant in that appeal. The learned Magistrate on 12 July 1939 found that the respondent (plaintiff) bought a piece of land from the first defendant twelve years before the action was filed. The respondent paid for the land and went into occupation and was still in occupation of the said land. After the respondent had paid for the land and went into occupation the first defendant sold the same piece of land to the appellant (the second defendant). The appellant, when he purchased the land knew that the land was sold to the respondent. The learned judge then ordered the appellant to transfer the land to the respondent. The appellant appealed to the second division of the High Court and the first division of the High Court but the appeals were dismissed in both courts. Despite this decision the appellant did not take any step to transfer the said land to the respondent and the respondent took no steps to execute the judgment until 5 January 1957 (more than twelve years after the judgment and the appeals). On 5 January 1959, the respondent made an application to the Alor Star Magistrates Court for an order calling upon the appellant to show cause why he should not be compelled to transfer the land in the respondent's favour. The Magistrate dismissed the application on the ground that it was statute-barred. The respondent did not appeal against that decision but, instead made an application by way of summons in chambers for an order varying the order of the first division of the High Court dated 17 February 1940 by the addition of the following words:

> And the Court doth further order that the 2nd defendant/appellant do transfer the land comprised in Surat Akuan No. 331/51 situate in the Mukim of Tualang, District of Kota Star to the plaintiff/respondent and in default whereof the Assistant Registrar of this Honourable Court be and is hereby empowered to sign the Memorandum of Transfer on behalf of the 2nd defendant/appellant.

The addition was designed to enforce the order of the Magistrate given on 12 July 1939. The learned judge allowed the application on the ground that he was exercising the inherent power of the court to vary its own order so as to carry out its meaning or to make its meaning plain. The appellant appealed against that decision and Good JA delivering the judgment of the Court of Appeal at pp. 14 and 15 stated:

> The respondent elected, instead of appealing, to circumvent the decision of the Magistrate in 1959 by starting proceedings *de novo* in the High Court; but here, says the appellant, he was statute-barred. It is true, as the learned Judge has correctly pointed out, that where the question is one of exercising the inherent discretion to vary an order to effect or explain its intention, "lapse of time has nothing to do with the question": *Hatton v. Harris*. But the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No. 60) which was repealed on the 18th February 1953, be brought within twelve Muslim years from the date of the judgment; and, under the Limitation Ordinance, 1953, which came into force on the 19th February, 1953, within 12 Gregorian years from the date on which the judgment became enforceable. There is no information on which to base a supposition that the Magistrate granted a stay of execution pending appeal. The date from which the period of limitation began to run was, therefore, the 12th July, 1939. Deducting the period of the Moratorium, from the 1st January, 1942 to the 13th September, 1949, the period from the 12th July, 1939, when the original judgment of the Magistrate was given, to the 11th February, 1959, when the summons-in-chambers was filed, was 12 years and 5 days, ...
>
> The summons-in-chambers was therefore barred by limitation and on this ground also the appeal must be allowed.

The appellants relied heavily on this case. The appellants' counsel then cited the case of *Sutton v. Sutton* [1882] 22 Ch. D 511 as to the rationale of the limitation where Jessel MR at p. 515 said:

But before reading the section upon which, of course, everything turns, I must say a few words and a few words only upon the nature and origin of the limitation with regard to the right to sue under such circumstances. The period of twenty years having been established as a bar to actions of ejectment, the same period was extended by the Judges to actions on bonds by analogy, and eventually became the settled law. After the lapse of twenty years without any payment having been made, it was said that it must be presumed that the debt had been satisfied. Then again that doctrine was extended somewhat, and ultimately it went to this extent, that if the mortgagor remained in possession for twenty years, and did not give any acknowledgment the mortgage would be presumed to be satisfied. That being the state of the law the *Statute of Limitations* (3 & 4 Will. 4, c. 27) laid down the same limitation to the recovery of a mortgage debt. What did that mean? Did it mean to cut down the old right as to presumption of payment? Surely not. If there is a presumption of payment by non-payment of any of the principal and interest or by not giving an acknowledgment, the statute was not intended to interfere with that, but rather to give legislative authority to that which had previously rested on judicial decision only. I think that is the fair view which we ought to take of the statute. If that is so, of course, the mere fact of saying you shall not recover upon a mortgage, would not keep alive any remedy upon the mortgage, whether that remedy was upon a covenant contained in the mortgage itself, or upon the implied promise which is presumed in law from the fact of accepting the loan, because it has been decided that if there is no covenant and no accompanying bond, there is still the implied promise to pay; and if there is a time fixed either by recital or otherwise for the repayment, in many cases depending upon the construction of the instrument, the Court will imply even a covenant to pay. That being so, every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced.

Let me now see what this 8th section of the Real Property Limitation Act says. ... Now the words that are material are, "No action, suit or other proceeding shall be brought to recover any sum of money secured by any mortgage." It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. ...

Further down at p. 517 his Lordship said:

Then there is this observation to be made. The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay ...

The learned counsel further submitted that the 'right to receive the money accrued' contained in the concluding words of s. 21(1) of the Limitation Act 1953 is the date when the cause of action accrues. In the case of a mortgage or charge the relevant date would be when the mortgagor or chargor is in

default of the original promise or obligation to pay the sum secured by the mortgage or charge. He pointed out that prior to 1965, the power of sale was conferred on the mortgage by the express terms of the mortgage deed but in Penang as well as in Malacca the power was limited by the operation of ss. 25 and 26 of the Conveyancing and Law of Property Ordinance 1886. After 1965, after coming into force of the National Land Code 1965, the code set out the power and procedure in respect of sale under ss. 253 and 270, they are merely procedural and do not affect the limitation period as provided by s. 21(1) of the Limitation Act 1953 that the period will start to run from the date "the right to receive the money accrued" and not from the date of the order for sale or the date of realization of the security of sale. The learned counsel then cited the decision in *McHenry McDermott v. Boyd* [1894] 3 Ch. D 290 which was cited with approval by Suffian LP (as he then was) in *Nadifinco Ltd. v. Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 where at p. 61 his Lordship said:

> Similarly, in my judgment, here too there is only one cause of action and it accrued as soon as the defendants failed to pay the first instalment due.

The appellants contended that the summons for directions constitute a fresh course of action and as such when it was filed, the limitation period had lapsed because it was more than twelve years after the decision of the Federal Court.

The learned counsel for the respondent in his reply stated that the issue here is not as to the principle stated by s. 21(1) of the Limitation Act.. The issue here is whether the summons for directions was caught by s. 21(1) of the Limitation Act. The respondent's counsel contended that the summons for directions in the present appeal is merely a continuation of the main proceedings and only in the form of a consequential order.

After hearing the submissions of the party, we agree with the respondent that the summons for directions is a mere continuation of the main proceedings which was the originating summons filed in the High Court on 12 April 1984 by the respondent. The High Court allowed the application but the appellant being unhappy with that decision appealed to the Federal Court against that order and the Federal Court on 14 September 1987 dismissed the appeal. The application by the respondent is consequential of the original order for sale given by the High Court which was to give effect to the order for sale. In our opinion, the summons for directions did not constitute a new or fresh action as contended by the appellant. The main action in the present appeal is the application for an order for sale which is still alive and pending. In *Forbes v. Lowsley & Anor* [1999] AC 329 HL the plaintiffs obtained consent judgment in February 1981. The defendant then went abroad and the judgment debt remained unpaid.

In 1992 the plaintiffs discovered that the defendant owned property and had a bank account in England. In July 1992, the Master granted the plaintiffs leave *ex parte* to enforce the judgment which was a charging order *nisi* on the defendant's property and a garnishee order nisi over his bank account, both in a sum representing the judgment debt plus eleven and a half year's interest. The defendant applied to set aside the garnishee and charging orders on the ground that execution of judgment was time-barred under s. 24(1) of the Limitation Act 1980. The judge refused the application on the ground that 'action' in s. 24(1) encompassed only fresh actions on a judgment and not garnishee and charging orders by way of execution of a judgment. He held further that by virtue of s. 24(2) the interest accruing would be limited to six years. On appeal, the Court of Appeal allowed the appeal by the plaintiff and dismissed the cross-appeal by the defendant. The Court of Appeal held that the judgment debt was not time-barred under section 24(1) and the interest accruing on it was not limited by s. 24(2). The defendant appealed against that decision. The House of Lords held: (1) that on their true construction the words 'an action ... upon any judgment' in s. 24(1) of the Limitation Act 1980 meant a fresh action and did not include proceedings by way of execution of a judgment in the same action; and that, accordingly, the plaintiffs were entitled to leave to enforce the judgment by way of garnishee and charging orders despite the passage of more than six years since the judgment had been entered. At p. 334, Lord Lloyd of Berwick said:

> My Lords, the Limitation Act 1980 continues to give rise to questions of some difficulty. Section 24 provides:
>
> > (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable. (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
>
> The word "action" is defined by section 38(1) as including "any proceeding in a court of law."
>
> The first question is whether section 24(1) bars execution of a judgment after six years, or whether it only bars the bringing of a fresh action on the judgment. If the answer is, as the plaintiffs contend, that it only bars a fresh action, the second question is whether, when a judgment is executed after six years, interest on the judgment is limited under section 24(2) to a period of six years before the date of execution ...

At p. 342 his Lordship said:

> For all these reasons I would hold that the first question must be answered in favour of the plaintiffs. "Action" in section 24(1) means a fresh action, and does not include proceedings by way of execution. It is unfortunate that the decisive point in the case did not emerge until the very end of the hearing. But having considered the point in the light of Mr. Hockman's written submissions, I am not left in any doubt as to the correct answer. I would therefore uphold the Court of Appeal on the first point, *albeit* for different reasons.
>
> With regret, however, I cannot agree with the Court of Appeal on the second question. There would seem to be no reason why the relevant words in section 24(2) "no arrears of interest ... shall be recovered" should not be given their ordinary meaning, so as to bar execution after six years in respect of all judgments. It is what the words say. "Recovered" has a broad meaning. It is not confined to recovery by fresh action.

The decision of *Lowsley & Anor v. Forbes* was cited with approval by our Federal Court in *The United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413. The wordings of s. 24 of the English Limitation Act 1980 are somewhat similar to s. 21(1) of our Limitation Act 1953.

The decision of this court in *Perwira Affin Bank Bhd v. Lim Weow* [1998] 4 CLJ 17 was cited to us by the respondent's counsel as to the effect of s. 21(1) of the Limitation Act 1953. In that case, Siti Norma Yaakob JCA (as she then was) delivering the judgment of the court said at pp. 24 and 25:

> Counsel for the respondent nonetheless maintained that a parallel can be drawn from s. 21(1) of the same Act and submitted that limitation had set in. The relevant provisions of sub-s. (1) of s. 21 read as follows:
>
> > 21(1). No action shall be brought to recover any principal sum of money secured by a ... charge on land ... or to enforce such ... charge, ... after the expiration of twelve years from the date when the right to receive the money accrued.
>
> "The right to receive the money accrued" in s. 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run. Since the notice was served on the respondent on the same date it was issued ie, 2 November 1979, the respondent had one month from that date within which to make payment. That brings us to 2 December 1979 and counting twelve years from that date takes us to 1 December 1991. It is not clear from the appeal records

> when the foreclosure proceedings were instituted in court but even taking the first order that was made on 2 June 1981, it is clear that limitation has not set in as to render "the first order unenforceable."

That decision made it clear that the Limitation Act applies to fresh foreclosure proceedings and not a continuation of that proceedings.

In our view, the decision of *Lowsley & Anor* applies to the present appeal. The decision of *Daud v. Ibrahim (supra)* cited by the appellants' counsel could easily be distinguished on the ground that the respondent in filing the application to vary the order of the learned Magistrate was in effect instituting a fresh action. *Lowsley & Anor* made it very clear that a recovery proceeding is not an 'action' within the meaning of s. 21(1) of the Limitation Act 1953.

After due consideration of the submissions, we find that there is no merit on the first ground raised by the appellant.

The second ground raised by the appellant was that the summons for directions is barred by delay and laches and that the appellants were prejudiced by the said delay. The learned counsel for the appellants contended that the respondent were guilty of delay and laches and cited s. 32 of the Limitation Act 1953 which provides:

> 32. Acquiescence
>
> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

In respect of this contention we would only refer to the events that took place between the decision of the Federal Court and the filing of the summons for directions, the subject matter of this appeal is whether the respondent was guilty of laches and acquiescence. The appellants' appeal against the order for sale was dismissed by the Federal Court on 14 September 1987. The respondent filed their summons for directions only on 22 December 1999, some twelve years and three months after the Federal Court's decision. Was the respondent guilty of delay and laches in the present appeal?

The learned counsel for the respondent in his written submission laid the chronology of events leading to the filing of the summons in chambers dated 22 December 1999. In the chronology of events, after the Federal Court gave its decision on 14 September 1987, the Bank Negara obtained an order dated 7 March 1989 from the court to appoint receivers and managers to take over the management and assets of the CCB (the original plaintiff in the present appeal). Apparently, there were some problems with that bank. On 2 September 1993, about four years and six months after the decision of the Federal Court,

the Bank Negara obtained an order discharging the receivers and managers. After discharging the receivers and managers, the affairs and the assets of the CCB was taken over by the Allied Bank (Malaysia) Berhad which changed its name on 28 April 1997 to Phileo Allied Bank (Malaysia) Berhad (the present respondent). In the meantime, sometime in 1995 and 1996, the parties in the present appeal negotiated for a settlement. Apparently, the negotiations ceased when the solicitor for the respondent passed away in June 1996. Sometime in March 1997, the respondent appointed Messrs Cheong Wai Meng & Van Buerle as their solicitors who filed the change of solicitors on 26 March 1997. At the same time the respondent's solicitors filed the notice of intention to proceed. It was then discovered that the relevant file in respect of the present appeal was missing from the court's registry and the present solicitors for the respondent had to reconstruct the file which was finally done sometime in April 1998. As pointed out earlier, the respondent's name was changed from Allied Bank (Malaysia) Berhad to the present name on 28 April 1997 which necessitated the change of name of the plaintiff/respondent from the Co-operative Central Bank to Allied Bank (Malaysia) Berhad to Phileo Allied Bank (Malaysia) Berhad. The respondent made two applications by summons in chambers dated 10 June 1997 and 25 June 1997 to amend the name of the plaintiff/respondent. Both applications were withdrawn with liberty on 8 September 1997. A fresh application to amend the name of the plaintiff/respondent in Originating Summons No. 209 of 1984 which application was allowed. On 22 December 1999, the respondent filed the summons for directions (the present appeal) and this was more than twelve years after the decision of the Federal Court.

It is clear to us that there was delay but was the delay deliberate? The respondent had given their explanation in the delay. Soon after the decision of the Federal Court, the former plaintiff were in serious financial and management problems which warranted the Bank Negara to appoint receivers and managers to manage the affairs and assets of the CCB (the then plaintiff). The affairs and assets of the CCB were taken over by the Allied Bank (Malaysia) Berhad (the present plaintiff) from the receivers and managers in 1995. In 1995 and 1996 there was negotiation for a settlement but fell through due to the death of the solicitor acting for the plaintiff. In 1996 the present solicitors were appointed by the plaintiff and in 1997 the present plaintiff changed its name which warranted the change of name of the plaintiff. In the meantime, the file in the court's registry went missing. It is clear to us since then the present plaintiff and their present solicitors set the motion of this appeal into full swing. As to the period from the decision of the Federal Court to the time when the

present plaintiff filed the summons for directions, there were good reasons for the delay in view of the former plaintiff being placed under receivership and the negotiations that were going on. The appellant did not dispute those facts other than stating that the respondent were guilty of delay and laches.

As such, there were delay in pursuing the summons for directions, it is clear to us there were good reasons for doing so. In our view, the respondent were not guilty of laches. For that reason, I find that there is no merit in the contention of the appellants that the respondent were guilty of delay and laches in accordance with s. 32 of the Limitation Act. In our view, the summons for directions (the present appeal) is only to give effect to the order for sale already affirmed by the Federal Court. As to prejudice claimed by the appellants, we are of the view that there was no prejudice at all. The interest is only applicable to the judgment obtained and had nothing to do with the sale. It was for the appellants to remedy themselves and not to wait for the sale.

For the above reasons, we could not find any merit in this appeal. The appeal is hereby dismissed. The order of the learned judge is hereby affirmed. The deposit is to be paid to the respondent to the account of taxed costs.